



NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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EX PARTE SUBMISSION

February 3, 2005

The Honorable Kevin J. Martin
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: CS Docket No. 98-120

Dear Commissioner Martin:

Four years ago, the Commission decided that cable operators should not be required to carry both the analog *and* digital signals of broadcast stations during the digital transition, or to carry more than a single stream of a broadcaster's multicast video programming after the transition. Nothing in the voluminous record amassed by the Commission since that time warrants reversal of either of those decisions. To the contrary, it is more clear than ever that dual and multicast carriage requirements are not required or authorized by the Communications Act, raise the most serious constitutional problems, and would serve no legitimate public policy purpose.

With respect to dual carriage, the statute authorizes the Commission to require carriage of those signals "which have been changed" to a new advanced television standard. During the transition, while broadcasters are still transmitting their analog signals, it cannot reasonably be said that those signals "have been changed" to digital signals, or that the digital signals are signals "which have been changed" from their former analog format.

In any event, even if the statutory language could somehow be read to require dual and/or multicast carriage of broadcasters' digital signals before their analog signals have been returned, the Commission was correct in tentatively concluding that such a requirement would be unconstitutional. And under the well-established "avoidance" doctrine, the Commission is compelled to interpret the Communications Act, if possible, in a manner that avoids serious constitutional problems.

To pass First Amendment muster under the standards set forth by the Supreme Court in the *Turner Broadcasting* must carry decisions, a dual carriage requirement would have to advance the interests underlying the must carry provisions, as articulated by Congress, and do so in a manner no more burdensome or restrictive of protected speech than is necessary. It cannot pass this test. Dual carriage is not necessary to serve either of the legitimate government

interests identified by the Supreme Court: *First*, it would do nothing to preserve the availability of free, over-the-air television, since over-the-air viewers would continue to have access to broadcasters' analog signals during the transition. And, *second*, it would do nothing to promote the dissemination of information from a "multiplicity of sources," since it would simply require carriage of an additional channel of programming that is, in most cases, duplicative of the programming on the broadcasters' analog channels, and is, moreover, provided by the very same source.

Expediting the transition to digital television is *not* one of the statutory purposes of the must carry provisions – but, in any event, a dual carriage requirement would not serve this objective either. Cable operators in 184 (out of 210) TV markets are already voluntarily offering their customers packages of HDTV programming. These packages include a substantial number of digital broadcast signals. (As of January 1, 2005, 504 local digital broadcast stations were being carried by cable systems.) And it includes 18 cable networks that now offer HD programming during some or all of their network schedules. To the extent that carriage of digital programming on cable systems is necessary to stimulate consumers to purchase digital television sets, cable operators are carrying available programming that is likely to have such an effect.

With respect to multicasting, the statute specifically limits carriage requirements to the "primary video" in a broadcaster's signal. The Commission reasonably concluded that only one of a broadcaster's multicast programming streams can be the "primary" video. This remains the only interpretation that is consistent with common and ordinary usage of the term "primary." As one court has noted, "there can only be one 'primary' anything." *Hakala v. Atxam Corp.*, 753 P.2d 1144 (S.Ct. Ak. 1988).

Again, however, even if it were possible to interpret "primary video" to mean *multiple* streams of video programming, such an interpretation would raise serious constitutional problems, which the Commission would be compelled to avoid. NCTA submitted an analysis by Professor Laurence Tribe, which explains why this is so.

Like a dual carriage requirement, a multicast mandate would do nothing to further the government interests underlying the must carry provisions of the statute. After the transition, cable operators will continue to be required to carry each broadcaster's primary digital video programming stream, which will have the effect of continuing to protect the programming that is currently available over the air. There is no evidence to suggest that carriage of additional multicast streams is in any way necessary to preserve the viability and continued availability of that currently available programming.

Moreover, requiring carriage of multiple streams of programming from a single broadcaster would obviously do nothing to promote availability of programming from a multiplicity of sources. Indeed, to the extent that such a requirement used up channels that would otherwise have been occupied by other non-broadcast programming, it would have precisely the opposite effect.

As in the case of dual carriage, a multicast requirement would also do nothing to promote the digital transition. Carriage of multicast standard definition digital programming on cable systems will not encourage anyone to purchase digital sets. Cable customers already have access to hundreds of channels of standard definition programming and would hardly be likely to purchase a new digital set in order to receive more of the same. Moreover, by guaranteeing carriage whether or not their programming is more attractive to cable subscribers, a multicast requirement would remove broadcasters' competitive incentives to develop quality programming that cable and over-the-air viewers *would* find compelling.

While dual and multicast carriage requirements would not promote any important government interest, they would impose substantial burdens on the First Amendment rights of cable operators and programmers. Broadcasters have argued that because cable operators are currently required to carry analog signals that use up 6 MHz of a cable operator's capacity, and because that requirement has been upheld as constitutionally permissible, any carriage requirement that can be accommodated with the same capacity would be no more burdensome and no less permissible.

That, of course, is not the case. What matters is not simply whether the amount of capacity required to accommodate must carry obligations has increased or diminished. What matters is whether the intrusion of carriage obligations on a cable operator's editorial discretion and channel capacity – and the discriminatory effects of such obligations on *non-broadcast* program networks – is no greater than necessary to serve the statutory purposes of the must carry provisions. If those purposes can be met by requiring carriage of a single video programming stream, there is no constitutional basis for requiring additional carriage – even if, as a result of technological advances, that single stream requires less bandwidth than before.

We would also like to respond to a January 27, 2005, filing by the NBC Television Affiliates and NBC Owned and Operated Stations.¹ The filing mostly addresses system capacity issues, which have been exhaustively studied by the FCC through filings by parties in this proceeding and capacity surveys initiated by the Commission itself.

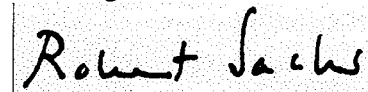
We believe, as the Comcast response to the NBC filing demonstrated, that cable operators plan to use bandwidth created by the collective, privately-financed \$95 billion rebuilding of their plant for a variety of video and nonvideo services; and that capacity for carriage is and will continue to be constrained. But the NBC filing is seriously misguided when it suggests that Congress, the FCC or the Supreme Court has ever reduced the debate about must carry to being simply a capacity question. Despite a current and future obligation to carry a broadcaster's primary signal, NBC's filing insists that once cable operators spend risk capital to rebuild plant, first claims for new capacity should meet multicast obligations. For reasons described above, that is simply not the law.

¹ Letter from David R. Siddall, to Marlene H. Dortch, filed Jan 28, 2005. This filing responds to a letter filed by counsel for Comcast Corp. more than four months earlier, on Sept. 16, 2004.

That NBC affiliates and owned stations should be making the case for must carry is even harder to understand.² These stations nearly always exercise retransmission consent rather than must carry rights. They can and do condition carriage of the primary signal on carriage of multicast signals or other forms of consideration, including carriage of other NBC-Universal programming. The relevance of multicast must carry to these stations is unclear – unless they want the Commission to rule that cable operators *must carry* all the multicast signals of a *retransmission consent* station.³ This would allow them to take multicast carriage off the table in retransmission consent negotiations. But nothing in the statute gives retransmission consent stations such a right.

In sum, after four years and a steady stream of comments and ex parte filings, it is clear that the Commission's decision not to require dual or multicast carriage was the right one. It was right as a matter of statutory construction. It was right as a matter of constitutional law. And it was right as a matter of sound public policy. It should be affirmed, and reconsideration should be denied.

Best regards,

A handwritten signature in black ink that reads "Robert Sachs". The signature is written in a cursive, slightly slanted style.

Robert Sachs

cc: Catherine Bohigian
Marlene H. Dortch

² Network affiliates have raised the must carry claims before; in earlier efforts ABC filed in support of a multicast carriage requirement even where a station elects retransmission consent. See NCTA letter to Marlene Dortch, CS Docket No. 98-120, Jan. 7, 2004 (responding to filings by NBC and ABC Owned Television Stations).

³ CBS Affiliates made this claim explicitly when they asked for an "anti-stripping" requirement that "would prohibit cable systems from stripping any free multicast services from broadcasters' digital signals, and would apply even if the digital signal were carried pursuant to a retransmission consent agreement. See Letter from Daniel Brenner, NCTA, to Marlene Dortch, MB Docket No. 03-15 and CS Docket No. 98-120, Apr., 20, 2004, at 5.